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SIPDIS

DEPT FOR WHA/CEN AND EB/IPC - WILSON/QUIGLEY
DOC FOR KSCHEGELMILCH
DEPT PLS PASS TO USTR - BPECK
DEPT PLS PASS TO USPTO - JURBAN/DLASHLEY-JOHNSON
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TAGS: ETRD KIPR PM ECONOMIC AFFAIRS

SUBJECT: PANAMA'S SCORECARD ON INTELLECTUAL PROPERTY RIGHTS

¶1. Summary and Comment: Overall, Panama's intellectual property rights regime is headed in the right direction and has improved during the past year. Panama has relatively well-developed intellectual property laws and institutions, and the GoP has increased specialized IPR training and technical support for local stakeholders. The GoP has also redoubled its efforts to legalize its software holdings this year, has strengthened its penal code, and is striving to fully implement its WCT and WPPT obligations. The specialized IP prosecutor's office leads concrete and energetic GoP efforts to pursue cases and enforce the law.

¶2. Enforcement, however, is far from ideal as police, customs, and prosecutors suffer from a lack of resources, and cases often stall in the judicial system. In addition, data exclusivity has become a concern. We are especially concerned with the dearth of resources for IPR enforcement in the Colon Free Zone (CFZ), outstanding international obligations, and the continuing lack of understanding of IPR within the judiciary. In short, penalties applied in the CFZ have often not had a deterrent effect. While the Embassy does not/not support a recommendation that Panama be placed on the Special 301 Watch List, we will continue to work with local stakeholders as well as U.S. industry representatives to press for continued improvement of IPR enforcement in Panama. End Summary and Comment.

Some GoP Institutions are Strong

¶3. The GoP Inter-institutional Commission for Intellectual Property includes Public Ministry prosecutors, Customs and the Education Ministry's Copyright Office officials, Colon Free Zone (CFZ) administration, and representatives from the Commerce Ministry's international trade office (VICOMEX) and industrial property registry (Digerpi). The Commission takes the lead on IPR activities and is proactive in developing campaigns against IPR infringement. Using GoP funds, the Commission organized and executed a series of four regional workshops in 2003 throughout Panama to raise general awareness of IP, and also proactively sought Interamerican Development Bank matching funds for a total of \$1 million to continue the campaign and also aid in modernizing Panama's IP laws.

¶4. The Industrial Property Office (Digerpi) of the Commerce Ministry maintains a centralized electronic database of all registered trademarks, accessible to remote users in the Intellectual Property Departments of both Customs and the CFZ, which allows those agencies to make determinations in potential infringement cases, and also to contribute information directly to the database. In 2003, the system "went mobile" as investigators can now use wireless connectivity with laptop computers to access the data while actually inspecting merchandise at a port or at the CFZ.

GoP's Software Legalization Finally Underway

¶15. The GoP negotiated a government software legalization agreement with the Business Software Alliance (BSA), which President Mireya Moscoso signed as Presidential Decree 273 on December 27, 2000. The agreement allowed for an 18-month analysis period, during which every government agency would audit the extent of its piracy, followed by an 18-month period of implementation, during which the GoP would license its software stock. The entire process was to be completed by December 2003. In April 2003, 40% of GoP agencies still hadn't undertaken the

audit, and even fewer had legalized their holdings. In response, the Ambassador and Embassy mounted an aggressive campaign to focus GoP attention on this matter, and included the agreement on the agenda of the Embassy-GoP Ad Hoc Investment Commission and the USTR-led Trade and Investment Committee. In the past few months, the GoP has finally moved to catalogue its software and most major ministries have either legalized or appropriated funds to legalize their holdings. In January 2004, BSA's local representative noted the sea change with the GoP, and emphasized that it was the direct result of Embassy intervention.

Panama Modernizes its IPR Penal Code

16. Law 1, promulgated on January 5, 2004, consolidated four previous IP-related laws, including parts of Panama's penal code. It clarifies the definition of IP itself and violations against it while strengthening IP penalties. While minimum jail sentences remain at one year, maximums have been increased to six years generally, and even up to twelve if a prosecutor can prove a linkage between IP violations and money laundering. The law also allows for "preventive detention" and sets a minimum of \$5,000 for bond while cases are investigated. While the law does not consider minimum financial penalties/fines, it does allow for companies, Colon Free Zone trading permits to be revoked, as well as suspension of work permits for street vendors. The law is a significant step forward for Panama. It includes a number of punishments that can be harsh enough to dissuade possible criminals from acting, yet allows for compassion in those cases where it's warranted.

Panama ratifies WIPO treaties, almost in full compliance

17. The GoP has signed and ratified ten World Intellectual Property Organization (WIPO) instruments, including the Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT). DIGERPI and the Education Ministry estimate that Panama's national law is about 90 percent in compliance with these two key international treaties, but the GoP readily recognizes that it must update its copyright laws to be completely in line. The office of the Vice Minister of Education took the lead on a law project to modernize the copyright law, but the proposal died in committee in the second legislative session of 2003. To date, the Ministry has not given a timeline to the Embassy for re-introduction of the bill, though we have provided useful texts and guidance from private industry to help with drafting the law.

Agencies Striving to Enforce IPR law

18. The specialized IP prosecutor's office with national jurisdiction (Ninth Circuit attorney--created in December 2002), has streamlined the execution of IPR cases, and now has four staff lawyers (twice as many as in 2002). The office has even taken on the role of training other prosecutors to serve in backup roles, most importantly the Tenth Circuit attorney. In one significant operation in November 2003, the office led an interagency team of prosecutors from Chiriqui province, the Technical Judicial Police, and National Police into nine different warehouses in the city of David. The operation led to the seizure of counterfeit Levis jeans and the closure of five of the warehouses. In another significant case in May 2003, the IP prosecutor led a team that seized 5000 counterfeit books. Panama's Customs Authority seized significant amounts of contraband and fake goods during the year, including over 20,000 pieces of diverse merchandise like Black&Decker in one operation in Balboa and 2 full containers of pirated CD's in another. The Colon Free Zone IP office averaged one on-site inspection per week in 2003 and seized over 11,000 cases of counterfeit and pirated goods. In a display of judicial strength, a circuit court judge ordered 7 million pirated CD's to be destroyed in December, related to cases that have resulted in 20 convictions since 1999.

Lack of Resources and a Still Weak Judiciary

19. U.S. companies have expressed concern about the general scarcity of resources and low priority given to IPR cases

by Panama's Attorney General's office. The specialized IPR prosecutor lacks even basic resources to conduct investigations and handle cases--and his office is better equipped than most other prosecutors,. Prosecutors often ask victims to pay fees for storing evidence and other incidental costs related to seizures and investigations. This is disturbing considering that enormous merchandise trade flows through the Colon Free Zone, mostly from Asia to other Latin American countries. Indeed, over 70% of IPR-related seizures in the CFZ originated from Asia in 2003. In addition, the music industry estimates that sales dropped by 30% in 2003, in large part due to piracy.

¶10. In spite of some successes like the destruction of 7 million CD's mentioned in para 8, Panama's judicial system is generally weak, and the slow and inefficient criminal processes against IPR violators often deny victims any meaningful remedy. (Note: Regrettably, this applies to the wider judicial system.) Cases brought before the criminal courts usually take years to be heard. Despite the GoP's concerted efforts to instill a better understanding of IPR, judges still lack a fundamental grasp of IP law and regard IP violations as misdemeanors, though the new penal code simplifies the laws and clarifies crimes. In one especially egregious example in Colon, a CFZ merchant who had been convicted of previous IP violations was acquitted in 2003 in a case that had first started in 1999. The judge had direct personal connections to the merchant and the merchant's company was clearly shipping several containers of contraband Philip Morris product.

Data Exclusivity a Concern

¶11. Panama's Health Ministry requires companies that wish to sell drugs and chemicals to apply for "sanitary registers" that detail chemical makeups and laboratory results related to the development of the products. Several U.S. companies have applied for the registers, been approved, and begun sale of their products, only to find that a generic, locally produced version appears on the market soon after. This indicates that the Health Ministry is not respecting the data exclusivity clause of Panama's Law 23 and is allowing other companies to view the proprietary data used in applying for sanitary registers. According to Health Ministry lawyers, the Ministry's organic law ("ley unica") does not contemplate data exclusivity and takes precedence over any other law. Ministry officials have expressed their willingness to address this issue and the Ministry is currently undertaking an extensive review of how to bring the two laws into harmonization, but has given no indication of when this might be achieved.

USG Provides Resources, Training

¶12. The Embassy has helped bridge some of the GoP's more glaring resource gaps. Using Narcotics Affairs Section (NAS) funds, we have provided a photocopier, cable internet connection, and a computer projector to the IPR prosecutor to help with IPR training and investigations. We have helped cover the costs of storing evidence for IPR cases. The CFZ uses USG-donated computers in several offices, and we are now undertaking a broader strategy of strengthening CFZ institutions. We have sent two DIGERPI officials to a USPTO conference in the United States in 2003. Finally, the Embassy is aggressively pursuing anti-corruption and justice reform programs.

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